IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 1102 OF 2004

Shyam Sunder Hari Shankar Gupta..... Appellant.

Versus

Harishankar Jyoti Prasad... ... Respondent.

Mr. Prem Prakash Kumar i/by Mr. B. P. Pandya for the Appellant.

Mr. Akhilesh Upadhye for the Respondent.

CORAM : A. S. OKA, J.

DATED : 19TH APRIL, 2005.

P.C.:

Admit. Learned Counsel appearing for Respondent waives service. Taken up for hearing forthwith.

2. Challenge in this appeal from order by appellant /defendant is to the judgment and order dated 29th September, 2004 passed by the learned trial Judge on notice of motion taken out by the respondent / plaintiff for temporary injunction. By the said order, while granting temporary injunction in favour of the respondent, the learned trial Judge has purportedly decided preliminary issue of jurisdiction raised by the appellant/defendant.

3. Learned Counsel appearing for the appellant submitted that the learned trial Judge has recorded only a prima facie finding on the issue of jurisdiction. He submitted that in view of the mandate of Section 9-A of the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code") the issue of jurisdiction ought to have been finally decided before taking up the notice of motion for hearing. He submitted that the entire procedure followed by the trial Judge is erroneous.

4. Learned Counsel appearing for the respondent has supported the impugned judgment and order. He submitted that the reasons given in the impugned judgment and order show that the preliminary issue of jurisdiction has been decided by the learned trial Judge and has been answered in favour of the plaintiff. He, therefore, submitted that no interference is called for.

5. I have considered rival submissions. Under Section 9-A of the Code, if objection is raised to the jurisdiction of the Court to entertain a suit at the time of hearing of interim application, the Court is under obligation to hear and decide the said objection

regarding jurisdiction. The question of interpretation of Section 9-A of the Code is no longer res integra in view of a decision of the Division Bench of this Court in the case reported in 1998 (3) Mh.L.J. 940 (**Meher Singh v/s Deepak Sawhny**). The Division Bench of this Court in the said case has categorically held that if issue regarding jurisdiction is raised at the time of hearing of an interim application, the Court is duty bound to frame the said issue and decide the same after giving an opportunity of leading evidence to both the parties.

6. The impugned order and judgment shows that the issue of jurisdiction was framed. There is some discussion about merits of the said issue in paragraph 6 of the impugned order. However, while answering the issue, the learned trial Judge has held that he is deciding the preliminary issue of jurisdiction, prima facie, in favour of the plaintiff. Once an issue of jurisdiction is framed, Section 9-A of the Code mandates that the same should have been decided finally. There was no question of learned trial Judge recording prima facie finding on the issue of jurisdiction. After recording a clear finding on issue of jurisdiction, the learned trial Judge could have proceeded to dispose of the notice of motion. In

the present case after expressing prima facie view on the issue of jurisdiction, the learned trial Judge proceeded to dispose of the notice of motion for temporary injunction. The learned trial Judge has expressed only a prima facie opinion on the issue of jurisdiction. The procedure adopted by the learned trial Judge is wholly erroneous and only on this ground the impugned judgment and order deserves to be quashed and set aside. Under Section 9-A of the Code, pending the decision on preliminary issue of jurisdiction, the civil court has power to grant suitable ad-interim relief. In the present case, it is not in dispute between the parties that by way of ad-interim relief pending the final disposal of the notice of motion, the learned trial Judge has directed the parties to maintain status quo in terms of the Commissioner's report. The said protection granted to respondent / plaintiff will have to be continued till the notice of motion is heard afresh.

7. Hence, I pass the following order:

(a) Impugned judgment and order dated 29th September, 2004 is quashed and set aside. Notice of Motion No. 1107 of 2004 is restored to file.

(b) Learned trial Judge will hear and decide the preliminary issue of jurisdiction which is already framed as expeditiously as possible and in any event on or before 31st August, 2005.

(c) The notice of motion No. 1107 of 2004 will be taken up by the learned trial Judge for final hearing after the preliminary issue of jurisdiction is decided.

(d) Till the final decision on preliminary issue and for a period of two weeks thereafter, the ad-interim relief which was operating in favour of the respondent / plaintiff in the notice of motion will continue to operate.

(e) All contentions of the parties are expressly kept open.

(f) Appeal from Order is partly allowed in above terms with no order as to costs.

8. Parties and the concerned Court to act on an authenticated copy of this order.

Sd/-

(**A. S. OKA, J.**)